

Theresa Rice

From: Roz Lassoff
Sent: Thursday, May 09, 2013 4:05 PM
To: Kathy Cook; Theresa Rice; Ryan Ericson
Subject: FW: Comments re SMP Update
Attachments: Presentation Notes SMP Update public hearing 050913.pdf

Roz Lassoff

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From: Christy Reynolds [<mailto:christy@ddrlaw.com>]
Sent: Thursday, May 09, 2013 3:29 PM
To: Council
Cc: Roz Lassoff; 'Dennis D. Reynolds Law Office'
Subject: Comments re SMP Update

Attached please find an updated version of Mr. Reynolds' presentation notes from last night's Public Hearing, adding just a few supplemental comments that were not included in the printed notes. In particular, the Council's attention is directed to the comments on page 5 regarding the City's exposure to litigation fees and costs. Our firm trusts these comments will aid the Council's deliberations on the Draft SMP. Thank you for your kind attention to this email and the attachment.

Sincerely,

Christy

Christy Reynolds, Legal Assistant
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SMP Update: Public Hearing
May 8, 2013

Dennis D. Reynolds

Presentation Notes [updated 5/9/13]

- I. On behalf of Bainbridge Defense Fund and its Members; Bainbridge Shoreline Homeowners and its Members; Nancy Strehlow; Blakely Harbor Homeowners (including Jack Sutherland and Gary Ames); Jerry DeGroot and Marie Fligsten; Brockman Builders.
- II. The City process is long but convoluted. It did not allow **effective** public comment for the following reasons:
 - A. Piecemeal review and approval, but whole is greater than the parts.
 - B. Only 13 days to review final draft submitted to the Council and Public on April 25, 2013.
 - C. No explanation of critical areas – where and what?
 - D. WAC 173-26-110(4) (obligation to “... document the necessity for the proposed change to the master program.”). No summary of reasons for proposed changes made available for public review and comment – left to guess.
- III. Fix it – there is time to get it right.
 - A. Eliminate Residential Conservancy designation.
 - B. No mitigation for minor incremental expansion of structures unless water ward of existing structure.
 - C. Allow lawn reseeding or replacement of landscaping.
 - D. Allow minor alterations of structures—adding a dormer does not justify mandating 65% of an existing yard be put into native vegetation.
 - E. For new development, let existing lot density requirements control. Provide incentives to enhance existing vegetation.

- F. Eliminate bans on docks. Remember: private docks allow upland owners less competition for use of public facilities.
 - G. Mandate compliance with other regulatory systems: Add local supplemental regulations only when necessary.
- IV. SMP can be approved which protects rights of shoreline owners and achieves no net loss.
- A. SSB 5451 clearly states that "Classifying existing structures as legally conforming will not create a risk of degrading shoreline natural resources."
 - B. Confidence in existing mitigation sequencing and permit system.
 - C. No documentation of regional adverse effects associated with existing regulatory system.
 - 1. ACOE regulations, 33 CFR Section 320.4(g)(2) state: "Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration."
 - D. Existing regulatory systems
 - 1. Docks/bulkheads (3 agencies with jurisdiction)
- V. Subjective aesthetic considerations do not control
- A. Young comments: There is no ecological function attached to a view.
- VI. Unprecedented regulatory expansion of regulation of shorelines located within municipal limits of a city, with no supporting science. Buffers for residential zones in excess of those found in other jurisdictions.
- A. Gig Harbor: 25 feet for city waterfront; 35 feet to 50 feet for all Low Intensity Residential zones but Henderson Bay; minimum 10 feet for nonconforming structures.
 - B. Port Townsend: 50 feet for non-water dependent use; 25 residential

- C. Burien: 15 feet to 30 feet¹
- VII. Significant increase of regulation of development. SMP Draft goes too far.
 - A. Chart
 - B. Increase of restrictive designations
 - 1. Aquatic A
 - 2. Aquatic B
 - 3. Rural Conservancy

VIII. Internal Inconsistencies

A. Water-dependent Uses

The entire purpose of living on the shoreline is to enjoy water-dependent uses such as stairs, docks, marine railways, swim floats and buoys. The Shoreline Management Act, GMA and DOE Guidelines all call for giving *preference* and *encouraging* water dependent uses, but the draft SMP designates or placed prohibitive restrictions on the entire outside of the Island, Fletcher Bay, Point Monroe Lagoon, the head of Eagle Harbor and Port Madison as not suitable normal water-dependent uses and banning docks. To do otherwise would violate the SMP's Master Goal page 15.

1.5 Master Goal

..... It is the intent of this program to manage the shorelines of Bainbridge Island consistent with the requirements of the Shoreline Management Act, the Shoreline Master Program Guidelines, and the Growth Management Act, **giving preference to water-dependent and water-related uses, and to encourage all reasonable and appropriate development and other activities** to occur in a manner which will promote and enhance the public interest and protect environmental resources.

B. Docks

Comment: Docks, marine railways and floats are the most important way waterfront owners access the water of the state and are critical for water-dependent uses. Narrow residential docks do not cause

¹ May 6, 2013 Draft.

measurable environmental harm and actually act as reefs that attract and promote health plant and fish communities. *See* PenTech paper, Ex.11, Reynolds Letter (4/09/13).

IX. External Inconsistencies.

A. SMA

1. The SMA explicitly states “[a]lterations of the natural conditions of the shorelines and shorelands **shall be** recognized by the department.” RCW 90.58.020. (Emphasis supplied.) Single-family homes and water-dependent uses such as docks are priority uses of the shorelines which fall within allowed alterations of the shorelines.
2. The SMA requires each local master program to protect “single family residences and appurtenant structures against damage or loss due to shoreline erosion.” The provisions of any SMP “. . . shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion.” RCW 90.58.100 (6) (emphasis added), especially structures built before 1991. The SMA requires each local master program to protect “single family residences and appurtenant structures against damage or loss due to shoreline erosion.” The provisions of any SMP “. . . *shall* provide for methods which achieve *effective and timely* protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion.” RCW 90.58.100 (6) (emphasis added), especially structures built before 1991.

B. Guidelines

1. No forced restoration allowed yet proposed SMP mandates restoration under the guise of “mitigation” of minor activities with no nexus to any measurable harm to aquatic environment. **Burden on government to show proof of harm.**
2. DOE Guidelines, Page 91: (b) **Piers and Docks.** New piers and docks shall be allowed only for water-dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use.

X. False Assumptions

A. Ecology will bear all litigation cost

1. DOE not a party to "as applied challenges"
2. Ecology "picks" its issues in an SMP appeal – may not take on or brief all issues
3. City a necessary party to appeal. So how will it look if the City does not file briefs or make argument in support of its own SMP?
4. Ecology would be liable for a takings claim but that type of claim likely would not be pursued by most property owners because the COBI is liable for applying regulations with no nexus and which are disproportionate. That is, the application is illegal and the City bears the expense of defending its Code application before the Examiner and the Superior Court in a Land Use Petition Act appeal. The City would have to pay any resultant damages, possibly including attorney fees and costs, under RCW 64.40.
 - a. Why adopt regulations that expose the City to "as applied" challenge?

XI. City Council is the decision-making body: The buck stops here.

- A. Ecology made us do it (No) (local circumstances).
- B. City Attorney says the proposal is legal but there is no case precedent for the requirements of the SMP as drafted: Cutting edge; no one really knows.
- C. A policy may be legal, but applying the SMP Update as currently written renders parts of it illegal. Is it good policy to approve a document knowing it has these specific legal problems associated with it which may force citizens to appeal?

Buffer comparisons of 1996 SMP & 2013 Draft SMP

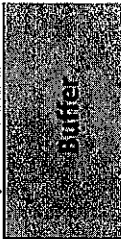
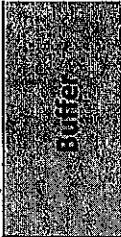
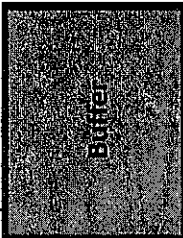


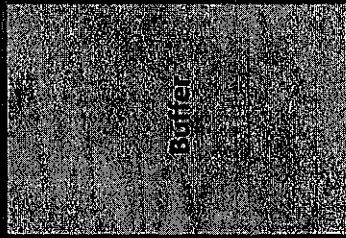
2013 Draft SMP Shoreline District is 200 feet from OHWM	Percent of Total Island Shoreline	Buffer width in feet	Portion of 100 x 200 ft. lot dedicated to Buffer	Portion of 50 x 100 ft. lot dedicated to Buffer
Shoreline Residential Conservancy	43%			
Category A - more than 65% canopy	10%	115	58%	100%
Category B - less than 65% canopy or High Bank or from OHWM or 75 ft. from top of bank	29%	115	58%	100%
Undeveloped	4%	150	75%	100%
Shoreline Residential	44%			
Category A - more than 65% canopy	11%	75	38%	75%
Category B - less than 65% canopy or High Bank or from OHWM or 50 ft. from top of bank	29%	75	38%	75%
Undeveloped	4%	150	75%	100%
Island Conservancy	10%			
Category A - more than 65% canopy	5%	150	75%	100%
Category B - less than 65% canopy or High Bank	5%	150	75%	100%
Natural	2%	200	100%	100%
Urban	1%	30	15%	30%

The 2013 Draft SMP would turn approximately **54%** of all shoreline land into buffers.

1996 SMP Shoreline District is 200 feet from OHWM	Percent of Total Island Shoreline	Buffer width in feet	Portion of 100 x 200 ft. lot dedicated to Buffer	Portion of 50 x 100 ft. lot dedicated to Buffer
Semi-rural	46%	50	25%	50%
Rural	45%	50	25%	50%
Conservancy	5%	100	50%	100%
Urban	3%	25	13%	25%
Natural	1%	N/A	N/A	N/A

The 1996 SMP made approximately **26%** of all shoreline land into buffers.

Illustrative Comparison of 1996 SMP & 2013 Draft SMP

1996 SMP		2013 Draft SMP			
Rural	Semi-rural	Shoreline Residential	Shoreline Residential	Shoreline Residential Conservancy	
<div> <div>Portion of 100 x 200 ft. Lot dedicated to Buffer</div> <div> <div>w/ 50 foot buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>	<div> <div>Portion of 100 x 200 ft. Lot dedicated to Buffer</div> <div> <div>w/ 50 foot Buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>	<div> <div>Category A & B Portion of 100 x 200 ft. Lot Dedicated to Buffer</div> <div> <div>w/75 foot Buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>	<div> <div>Undeveloped Portion of 100 x 200 ft. Lot Dedicated to Buffer</div> <div> <div>w/150 foot Buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>	<div> <div>Category A & B Portion of 100 x 200 ft. Lot Dedicated to Buffer</div> <div> <div>w/115 foot Buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>	<div> <div>Undeveloped Portion of 100 x 200 ft. Lot Dedicated to Buffer</div> <div> <div>w/150 foot Buffer</div> <div>  </div> </div> <div>Potentially Usable portion of lot</div> </div>